State Of Michigan
in the
Supreme Court

Appeal from the Court of Appeals

Joyce McDowell, et al,

Plaintiffs-Appellees,

v.

City of Detroit, et al

Defendants-Appellants.

Supreme Court No. 127660
Court of Appeals No. 246294
Wayne Circuit Court No. 00-039668-NO

Amicus Curiae Brief

Commercial Leasing Committee,
Real Property Section,
State Bar of Michigan

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Statement of *Amicus Curiae*

On January 13, 2006, this Court entered its order granting the application for leave to appeal in the instant action. In that order, the Court invited The Real Property Law Section of the State Bar of Michigan, among others, to file briefs *amicus curiae,* and further stated:

> "The parties are directed to include among the issues briefed: (1) whether, in general, a lease includes both the inner and outer walls of the leased premises, see, e.g., *Forbes v Gorman*, 159 Mich. 291, 294 (1909), and (2) whether the general rule was modified by the portion of the subject lease that limited the tenant's right to make "alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management."

This brief is filed in response to that invitation and is intended to address those issues identified by this Court.

Introduction and Caveat

Under *Hadfield v. Oakland County Drain Comm'r.*, 430 Mich. 139, 422 N.W.2d 205 (1988), *overruled (prospectively only), Pohutski v. City of Allen Park*, 465 Mich. 675, 641 N.W.2d 219 (2002), this Court must determine whether the fire that is assumed to have started in the space between the walls of plaintiffs' apartment, started in property that belonged to the plaintiff or the defendant. If this Court finds that the space between the walls belonged to the defendant, then the trespass-nuisance exception to governmental immunity might apply.

In reaching this conclusion, the Court has asked for assistance in determining the naked ownership of that small area of property under our law. Unfortunately, as this brief establishes, the law of landlord and tenant has not been static. While our society advanced from an agrarian economy, through the industrial age, and into the information age, the law of landlord and tenant advanced with it.

To now attempt to extract an isolated ruling from decades of precedent that was decided under an evolving doctrine creates an enormous risk that in an inappropriate result will be achieved. What follows is a discussion of how the ownership of that small piece of real property should be determined under Michigan law.

DISCUSSION

A. At common law, the entire property (including the space between the walls) was leased to the tenant and the landlord did not retain control for any purpose.

Before proceeding to discuss the current state of landlord/tenant law in Michigan, it may be useful to look first at the issue under common law:

> The common-law duty [owed by the landlord to the tenant] is predicated upon the concept that a lease is equivalent to a sale. The lessor, absent agreement to the contrary, surrenders possession and holds only a reversionary interest. Under such circumstances, he is under no obligation to look after or keep in repair premises over which he has no control. Prosser, *Torts*, 3d ed., s 63, pp. 411--412; Harkrider, *Tort Liability of a Landlord*, 26 Mich. L. Rev. 260, 383.

Lipsitz v. Schechter, 377 Mich. 685, 687, 142 N.W.2d 1, 2 (1966).

This doctrine has been referred to as "landlord out of possession." *Woodbury v. Bruckner,* 248 Mich. App. 684, 650 N.W.2d 343, 350 (2001). The crux of the theory was that the landlord, having granted all rights to possession to the tenant, was not in a position to maintain the premises, much less have notice of any defects that might need repairing.

Under this doctrine, if the landlord wanted to retain any rights in any part of the premises that were given to the tenant (including the right to enter the premises), that right would have to be expressly "reserved" in the lease. M. Friedman & P. Randolph, Jr., *Friedman on Leases* (Practicing Law Institute, November 2005), § 4:3 (Landlord's Right to Enter, Inspect, Repair, and Exhibit Leased Premises) ("By leasing the property, a landlord vests the tenant with a right to exclusive possession, which precludes

landlord's entry except for a few limited purposes"). *See also Bluemer v. Saginaw Central Oil & Gas Service, Inc.,* 356 Mich. 399, 97 N.W.2d 90 (1959) (Where the lease of a gasoline filling station did not reserve to landlord the right to control either premises or business, the landlord was not liable for injuries sustained when a customer fell through an open trap door designed to permit access to basement).

In practice, a landlord that wants to be certain that it can have access to, or control of, various areas within the property (including the space between the walls), would be well advised to "reserve" those rights in the lease agreement. The following discussion about "describing the premises," from one of the most frequently consulted leasing treatises, is helpful:

> A landlord may expressly exclude some matters from a description of the leased premises. Excluding the outer walls of a building precludes the tenant from using this space for signs, awnings, or marquees. A lease of a store in a shopping center may be limited to the structure and exclude the land. This reserves to the landlord the use of subsurface areas for utilities and tunnels for underground roads, which may be desirable for bringing merchandise into large shopping centers. If a landlord contemplates the possibility of adding rental space by adding one or more stories, the right to do this should be carefully reserved, including the right to cut the roof, bring in supporting members, and interfere to the extent necessary with the tenant's enjoyment of his space.

M. Friedman & P. Randolph, Jr., *Friedman on Leases* (Practicing Law Institute, November 2005), § 3:1 - The Leased Premises—Description.

In a subsequent section, the treatise specifically addresses the issue of reserving a right to access inside the walls of the leased premises for installation of telecommunications wiring and equipment:

> Today the "hot" topic is telecommunications towers, but it is safe to say that, just as telecommunications towers were not perceived as a significant leasing issue twenty years ago, some other valuable use might arise in the near future, such as satellite receiving stations, weather analysis or even weather generating equipment, or other technology. It is quite possible that these kinds of technological installations will have

> minimal impact on the use and enjoyment of the building, but may be extremely valuable, in some cases more valuable than the use of the building itself. **Thoughtful landlords, even in the lease of a complete building, may want to consider reserving the right to use roof and wall space to accommodate such facilities and, within reason, to enter the tenant's premises to install and maintain such facilities.** Existing language giving the landlord access for maintenance or inspection may not be sufficient, as these new facilities are likely to be owned and maintained by third parties.

M. Friedman & P. Randolph, Jr., *Friedman on Leases* (Practicing Law Institute, November 2005), § 3:2 – Appurtenances (emphasis supplied).

Under the common law doctrine of "landlord out of possession," you might expect that a landlord would have no responsibility for damages originating inside the walls of the premises: (1) a lease is equivalent to a sale, (2) the landlord surrenders possession, and (3) the landlord is under no obligation to look after or keep in repair premises over which he has no control.

While, on its surface, the case of *Forbes v. Gorman,* 159 Mich. 291, 294 (1909), appears helpful in determining who "owns" the space between the walls in the Appellee's apartment, further caution is warranted. In *Forbes,* the tenant leased the first floor and basement of a multi-story building. The lease expressly granted the tenant the right to install a sign "on the outside of said building, overhead the premises occupied by them, and on top of said building." 159 Mich. at 292.

The greedy tenant decided that if it could use the roof to advertise its own business, it should be permitted to sublet the roof for advertising to someone else. The landlord was understandably upset and demanded that the tenant account for the profits it received from the sublease of the landlord's roof. The Court held that lease of the first floor and basement might permit the tenant the absolute right to advertise on the exterior walls of the first floor of the building. The express language of the lease,

granting the tenant the right to advertise its business on the roof, did not permit the tenant to sublease the roof to a third party. In reaching this conclusion, the Court relied on a case that said: "the outer side of the wall is but one side of the same wall that has an inner side." This statement, however, is not essential to the holding that use of the **roof** was not permitted *Forbes,* and is, therefore, *dicta.*

The *dicta* from *Forbes v. Gorman* is consistent with the holding in dozens of other cases discussing a tenant's rights to use the outside walls for advertising purposes. *See* M. Friedman & P. Randolph, Jr., *Friedman on Leases* (Practicing Law Institute, November 2005) § 33:1 (Sign and Advertising Rights of Landlord and Tenant). Each of these cases would appear to discuss the inside and outside walls, solely for the purpose of determining the tenant's right for outside signage. While these abundant cases, and *Forbes v. Gorman,* may appear to have bearing on the issue of who was the "owner" of the wall covered by a lease for advertising purposes, there is no logical basis for extending that limited conclusion to assist this court in determining liability for a fire that started in the space between the inner and outer walls.

B. Courts began to chip away at the common law doctrine by focusing on which party had control over the part of the premises in question.

In *Nederlander v. Cadillac Clay Co.,* 264 Mich. 434, 250 N.W. 281 (1933), the tenant leased the 'first floor and basement' of the building. The premises became uninhabitable because of leaks from water pipes placed between the tenant's ceiling and the floor of the premises occupied by a different tenant above. The Court held that while a landlord was ordinarily not required to keep the premises leased in repair, that

rule has no application if the premises were rendered untenantable by a condition existing in another part of the building over which the tenant had no control.

A similar result was reached in *Everson v. Albert,* 261 Mich. 182, 246 N.W. 88 (1933), where the tenant claimed that a failure of plumbing located in parts of the building other than the leased premises caused a constructive eviction, and the Court agreed, finding that "where the landlord retains possession or control over a portion of the premises, that he is bound to keep the portion of the premises under his control in such condition of repair as will not interfere with the peaceable possession and enjoyment by the tenant of that portion which he has leased." 250 N.W. at 286.

For a collection of cases discussing a landlord's retained control over the electrical system of an apartment building, the Court's attention is directed to *Osborn v. Brown*, 361 So.2d 82, 88 (Ala.,1978).

C. Ultimately, Michigan Courts had to come to grips with a change in the nature of modern urban leasing and they abandoned the common law doctrine.

In the second half of this century, courts began to recognize that the feudal notion of landlord-tenant law--rooted in the special needs of an agrarian society--had not been a realistic approach to landlord-tenant law. The shift to a 'predominantly contractual' analysis of leasehold interests is best described in the U.S. Supreme Court's decision in *Lindsey v. Normet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972):

> The legal rules pertaining to the repair of leaseholds became wholly unreal and anachronistic with increasing urbanization during the 19th century, with the increasing reliance on multi-unit rental property, such as tenement

> houses, to provide shelter for the urban areas' growing industrial labor population. In an agrarian setting it made sense to require the tenant to keep in good repair an entire dwelling house he had rented from an owner. On the other hand, to require a relatively transient tenant to assume the obligation of repair in a multi-unit building or in a tenement house with respect to his rooms and with respect to plumbing, heating, and other fixtures that were interconnected with other parts and fixtures in the building made no sense at all.' Legal Remedies for Housing Code Violations, National Commission On Urban Problems, Research Report No. 14, pp. 111-112 (1968).

Lindsey v. Normet, 405 U.S. 56, at n. 12 & n. 13.

In 1968, the Michigan legislature abandoned the common law rule as it related to residential dwellings by adopting Act No. 286 of the Public Acts of 1968, Mich. Comp. Laws Ann § 125.536 (Thompson/West 2006).

In 1977, this Court abandoned the common law rule in the commercial context, as well, by adopting section 357 of the Restatement Torts, 2d, and expressly overruling the prior limitations of landlord liability set forth earlier cases. *Mobil Oil Corp. v. Thorn,* 401 Mich. 306, 258 N.W.2d 30 (1977).

D. Does the lease provision limiting the tenant's right to make alterations or repairs without the landlord's consent shift the ownership or control of the space between the walls from the landlord to the tenant?

As stated above, caution should be taken in attempting to extract an isolated ruling from decades of precedent that was decided under an evolving doctrine. That risk is best understood in addressing the Court's second issue.

In the unpublished decision of *Emmons v. Harden Acres, LLC,* 2004 WL 1672435 (Mich. App. unpublished, July 27, 2004), the plaintiff was injured when she slipped and fell down three steps at a home she rented from defendant. After the trial

court granted summary disposition in favor of the landlord, the plaintiff appealed. As one of her arguments, she argued that the defendant had retained control of the premises because "plaintiff was not allowed to make any repairs to the premises without defendant's permission."

On appeal, the plaintiff relied upon the doctrine of the landlord's control, as set forth in *Lipsitz v. Schechter,* 377 Mich. 685; 142 NW2d 1 (1966), which held that: (1) a landlord generally does not have a common law duty to keep leased premises in repair because he has surrendered possession of the premises and therefore has no control, and (2) a landlord does have a common-law duty to keep in safe condition any portion of a building over which the landlord has retained control. 377 Mich. at 687-88.

The Court never reached the issue of whether the express provision requiring the landlord's consent to alterations shifted that "control," saying:

> Plaintiff's reliance on *Lipsitz* is misplaced, however, because as we observed in *Woodbury v. Bruckner* (On Remand), 248 Mich. App 684, 697; 650 NW2d 343 (2001), the "landlords out of possession" doctrine, under which the landord's common-law duty to a tenant depended on whether the landlord retained control over the premises, was overruled in *Mobil Oil Corp v. Thorn,* 401 Mich. 306; 258 NW2d 30 (1977). Accordingly, we conclude that contrary to plaintiff's contention, *Lipsitz* does not govern defendant's common-law duty to plaintiff.

Emmons v. Harden Acres, LLC, 2004 WL 1672435 (Mich. App. unpublished, July 27, 2004). This unpublished opinion explains why there is a paucity of authority on the issue upon which this Court sought input from the *amici.*

This change in the law evidenced by *Restatement 2d.* and *Mobil Oil* has caused further complications. The changes brought about by the *Restatement* were not adopted uniformly in the context of residential and commercial leases. For example, some of the cases cited on this issue in the Insurance Institute of Michigan's *Amicus*

Brief, suggest that the landlord's retention of a right to consent to alterations or improvements does not establish sufficient landlord control from which this Court could impose liability for defects. In both *Horstman v. Glatt,* 436 S.W.2d 639, 644 (Mo. 1969), and *Humphrey v. Byron*, 447 Mass. 322, 850 N.E.2d 1044 (2006), the courts, however, explicitly distinguished their holding from the result that would be obtained in residential transactions.

In *Horstman v. Glatt,* the Missouri Supreme Court distinguished its holding in the commercial context at issue from two cases involving residential landlords, where the landlords' rights to make repairs were found to be adequate "control" for the purpose of finding liability of the landlord. *Lemm v. Gould,* 425 S.W.2d 190 (Mo. 1968), and *Minton v. Hardinger,* 438 S.W.2d 3 (Mo. 1968).

Similarly, in *Humphrey v. Byron*, the court explicitly noted that an earlier decision had held that, in the context of a residential lease, even in the absence of an express agreement to keep rented premises in repair, the landlord "had a duty to exercise reasonable care to assure that others legitimately on the leased premises were not subject to an unreasonable risk of harm." *Young v. Garwacki,* 380 Mass. 162, 171, n. 12, 402 N.E.2d 1045 (1980). The court went on to hold that, in the commercial context, a lease requirement that the landlord give its prior written consent to construction that the tenant proposes to undertake, does not constitute adequate "control" to impose liability on the landlord an injury occurring on the leased premises." *Humphrey v. Byron*, 447 Mass. 322, 330, 850 N.E.2d 1044, 1050 (2006).

In the context that these issues have arisen, it is not surprising that little consistent authority could be found.

CONCLUSIONS

Issue No.1: In general, does a lease include both the inner and outer walls of the leased premises, see, e.g., *Forbes v Gorman*, 159 Mich. 291, 294 (1909):

This *amicus curiae* responds that it is not possible to answer the isolated question raised in *Forbes v Gorman* without reference to the development of landlord tenant law in the last century. That law would clearly hold that the landlord in a multi-unit residential facility retains sufficient control of the rest of the property to make the landlord responsible for the maintenance of electrical circuits inside the walls of the leased premises. We believe that this conclusion is supported by current custom and practice (in our experience, landlords retain control of the space between demising walls as part of the common areas in which the tenant has limited use rights). Moreover, that custom and practice was evident in the instant action when the landlord sent a repair person to investigate the tenant's complaint about the electrical outlet.

Issue No. 2: Was the general rule was modified by the portion of the subject lease that limited the tenant's right to make "alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management":

The conclusion on issue no. 1 makes it unnecessary to reach the conclusion on issue no. 2. If the landlord's control makes it responsible for the for the maintenance of electrical circuits inside the walls of the leased premises, then, *a fortiori,* the express lease restrictions on the tenant's ability to make alterations or repairs to that outlet further demonstrates the extent of the landlord's control.

Respectfully submitted,

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CERTICATE OF SERVICE

I hereby certify that on November 6, 2006, I sent a copy of the foregoing the *Amicus Curiae* Brief Commercial Leasing Committee, Real Property Section, State Bar of Michigan, by facsimile and first class mail, to:

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